Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1977

No. 77-77-1799

UNITED FEDERATION OF TEACHERS WELFARE FUND,

Petitioner,

vs.

STATE HUMAN RIGHTS APPEAL BOARD and STATE DIVISION OF HUMAN RIGHTS on the Complaint of PHYLLIS R. GOODKIN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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In The

Supreme Court of the United States

October Term, 1977

No. 77-

UNITED FEDERATION OF TEACHERS WELFARE FUND,

Petitioner,

vs.

STATE HUMAN RIGHTS APPEAL BOARD and STATE DIVISION OF HUMAN RIGHTS on the Complaint of PHYLLIS R. GOODKIN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The petitioner, United Federation of Teachers Welfare Fund, respectfully prays that a Writ of Certiorari issue to review the order of the Court of Appeals of the State of New York, entered in this proceeding on March 23, 1978.

OPINION BELOW

The decision and order of the New York State Division of Human Rights, not yet officially reported, is printed in Appendix A. The decision and order of the New York State Human Rights Appeal Board, not yet officially reported, is printed in Appendix B. The orders, of the Appellate Division, First Judicial Department of the Supreme Court of the State of New York, not yet officially reported, are printed in Appendix C. The order of the Court of Appeals of the State of New York, not yet officially reported, is printed in Appendix D.

JURISDICTION

The order of the Court of Appeals of the State of New York was issued March 23, 1978 and this petition for certiorari was filed within ninety (90) days of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

1. Whether the New York State Human Rights Appeal Board and the New York State Division of Human Rights are pre-empted by the provisions of the Employee Retirement Income Security Act of 1974 from asserting jurisdiction over the United Federation of Teachers Welfare Fund?

2. Whether the New York State Human Rights Appeal Board and the New York State Division of Human Rights are pre-empted by virtue of Article VI, Clause 2 (the Supremacy Clause), of the United States Constitution from asserting jurisdiction over the United Federation of Teachers Welfare Fund?

3. Whether the decisions of the New York State Human Rights Division holding that the United Federation of Teachers Welfare Fund violated the Human Rights Law by excluding pregnancy and related conditions from fringe benefits coverage are in conflict with the recent United States Supreme Court decision in *Geduldig v. Aiello,* 417 U.S. 484, and *Matter of General Electric Co. v. Gilbert,* 429 U.S. 125, 45 U.S. Law Week 4031, decided December 7, 1976.

STATEMENT OF THE CASE

This case presents a significant question involving the right, if any, of a state administrative agency, (*i.e.*, the New York State Division of Human Rights), to assert and maintain jurisdiction over a welfare fund (an employee benefit plan), in the face of the supersedure provisions of the Employee Retirement Income Security Act of 1974 and Article VI, Clause 2 of the United States Constitution.

Certain specified employees employed by the Board of Education of the City of New York (herein the "Board"), have been and presently are entitled, subject to certain hereinafter described eligibility requirements, to health and welfare benefits, including supplemental obstetrical payments, provided by the United Federation of Teachers Welfare Fund (herein the "Fund"). The Fund, which was established as a result of collective bargaining between the United Federation of Teachers (herein the "UFT"), and the Board, receives contributions from the Board in accordance with the provisions of the UFT — Board collective bargaining agreement.

At its inception in 1965, the Fund's Board of Trustees promulgated and thereafter caused to be maintained certain rules of eligibility. Specifically, day school teachers (such as the State Division of Human Rights' complainant Phyllis R. Goodkin), who are (a) compensated on an annual basis by the Board; (b) covered by agreements with the UFT, and (c) for

whom the Board contributes or should contribute monies to the Fund, are deemed to be "covered employees" and, subject to certain eligibility requirements, are entitled to benefits provided by the Fund.

More particularly, "covered employees" ". . . are eligible for benefits so long as they are in active status. Active status is determined by and is coextensive with the period for which contributions are paid, or should have been paid for the employees of the Board to the Fund."

Significantly, a regularly appointed employee on authorized sick leave without pay (for a period not exceeding one year), is considered under the rules of eligibility to be on active status. However, and of significance in this case, should any male or female "covered employee" secure authorization to take maternity leave, personal leave, child care leave, travel leave or study leave, such employee ceases to be on "active status" and loses his or her eligibility to secure benefits from the Fund.

In the instant matter, Phyllis R. Goodkin, a teacher employed by the Board, during the period 1961 through September, 1971, requested and was granted by said Board a maternity leave effective on or about September 14, 1971. Thereafter, on October 11, 1971, Goodkin gave birth and subsequently applied to the Fund for a $50 supplementary obstetrical benefit. Based upon the previously described eligibility rules, Goodkin was notified by the Fund that her claim for supplemental obstetrical benefits was denied because she was not in "active status" when her claim arose.

Upon receipt of the denial of her claim for obstetrical benefits, Goodkin filed a complaint with the State Division of Human Rights (herein the "Division").

Subsequent to the holding of hearings, the Division, on June 20, 1975, issued a decision and order finding that the Fund

had violated the Human Rights Law (Executive Law, Article 15), of the State of New York, by maintaining a policy or practice which treated maternity leave less favorably than leave for other disabilities and by specifically denying supplementary obstetrical benefits to the complainant, Goodkin.

Upon the filing of an appeal with the State Human Rights Appeal Board (herein the "Appeal Board"), the Appeal Board on July 5, 1977, issued a decision and order affirming the order of the Division, wherein it concluded that neither it nor the Division were precluded from asserting jurisdiction over the Fund by virtue of the supersedure clause of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1144(a) (Appendix B).

Thereafter, in accordance with Section 298 of the Human Rights Law, the Fund and the UFT brought a proceeding to obtain judicial review of both the Division and Appeal Board decision in the Appellate Division, First Judicial Department of the Supreme Court of the State of New York.

On October 13, 1977, the Appellate Division, without opinion, affirmed the determination of the Appeal Board. Subsequently, on December 20, 1977, the Appellate Division, without opinion, denied an application by the Fund and the UFT for (1) leave to reargue their petition to review the determination of the Appeal Board, and (2) for leave to appeal to the Court of Appeals of the State of New York.

On March 23, 1978, the Court of Appeals of the State of New York, without opinion, denied an application filed by the Fund and the UFT for leave to appeal.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals, by declining to review decisions of the Division, the Appeal Board and the Appellate Division, First Judicial Department of the Supreme Court of the State of New York, has failed to consider an important question of federal law in a case of novel impression which requires decision by the Supreme Court of the United States.

Specifically, the State Court of Appeals, apparently relying upon its decision in *Brooklyn Union Gas Company v. State Human Rights Appeal Board*, 41 N.Y. 2d 84,[1] declined to review the decisions of the Division and Appeal Board (Appendices A and B), which are to the effect that the supersedure clause of the Employee Retirement Income Security Act of 1974, (herein "ERISA"), does not pre-empt such state administrative agencies from applying State fair employment legislation to employee benefit plans, such as the Fund.

Since the State Court of Appeals' refusal to consider the issue of pre-emption, this Court, on April 3, 1978, in *Malone v. White Motor Corp.*, ____ U.S. ____, 97 LRRM 3147, in footnote #1 thereof, held that ERISA "provides for comprehensive federal regulation of employee pension [and welfare] plans, 29 U.S.C. §1001 *et seq.*, and contains a provision expressly pre-empting all state laws regulating covered plans." (29 U.S.C. §1114). Thus, given this Court's conclusion in *Malone v. White Motors Corp., supra*, and given the clear and unambiguous language of ERISA's supersedure clause, 29 U.S.C. §1114, it would appear clear that the State Court of Appeals erred in refusing to consider the petitioner's motion for leave to appeal.

1. A case in which the State Court of Appeals concluded contrary to this Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125, that "an employment personnel policy which singles out pregnancy and childbirth for treatment different from that accorded other instances of physical or medical impairment or disability is prohibited by the Human Rights Law".

II.

The State Court and administrative decisions below conflict with decisions of the United States Supreme Court.

In the instant circumstances, the Fund finds that it is caught in a continuing morass of conflicting federal and state law regarding its obligation, if any, to provide pregnancy and pregnancy related disability benefits to UFT members.

Thus, notwithstanding this Court's recent decisions in *Geduldig v. Aiello*, 417 U.S. 484 (a case involving a Fourteenth Amendment claim to pregnancy related disability benefits); *Matter of General Electric v. Gilbert*, 429 U.S. 125; and *Women In City Government United*, 429 U.S. 1033 (cases involving claims to pregnancy disability benefits under Title VII of the Civil Rights Act of 1964), in which cases it was repeatedly held that an exclusion of pregnancy from a disability benefit plan providing general coverage is not a gender-based discrimination; the Division and State Court of Appeals have declined to follow such precedents. Rather, the Court of Appeals, shortly after the decision in *General Electric, supra*, issued a decision in *Brooklyn Union Gas Company v. State Human Rights Appeal Board*, 41 N.Y. 2d 84, where, upon construing Section 296 of the Human Rights Law (the provisions of which are substantially identical to those of §703(a)(1) of Title VII of Civil Rights Act of 1964), held that while the determination of the United States Supreme Court in *General Electric, supra*, was "instructive", it was not binding. The State Court of Appeals then went on to hold that personnel policies, which single out pregnancy and childbirth for treatment different from that accorded other forms of disability is prohibited by the Human Rights Law.

In conjunction with the petitioner's ERISA pre-emption contention, petitioner further urges that the Division is also pre-empted from asserting jurisdiction over it by virtue of Article VI, Clause 2 (the Supremacy Clause), of the United States

Constitution. Thus, in *Merrill, Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127, and in *DeCanas v. Bica*, 424 U.S. 351, footnote 5, this Court held as follows:

> "Even absent . . . a manifestation of congressional intent to 'occupy the field', the Supremacy Clause requires the invalidation of any state legislation that burdens or conflicts in any manner with any federal laws."

Given the obvious conflict between federal and state law regarding pregnancy disability benefits and relying upon such cases as *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132, and *Merrill, Lynch, supra*, this Court is respectfully urged to find that the Supremacy Clause requires the invalidation of state decisions, at least insofar as such decisions burden and conflict with the federal law in this field. In this regard, Mr. Justice Brennen, in *Florida Lime, supra*, aptly held as follows:

> "The test of whether both federal and state regulations may operate or state regulations must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives."

CONCLUSION

For the foregoing reasons, the Fund respectfully prays that this petition for a Writ of Certiorari be granted.

June 9, 1978

Respectfully submitted,

s/ Stephen F. Gordon
s/ Robert M. Ziskin

MIRKIN, BARRE,
SALTZSTEIN & GORDON, P.C.
Attorneys for Petitioner

APPENDIX

APPENDIX A — DECISION AND ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
DIVISION OF HUMAN RIGHTS
270 Broadway, New York, N.Y. 10007

WERNER H. KRAMARSKY
Commissioner

N O T I C E

Enclosed herewith is a copy of Commissioner Werner H. Kramarsky's Order with regard to the matter set forth therein.

If this Order requires any party or parties to report to the Division such reports must bear the file number of the case as listed in the upper right hand corner of the Notice of the Order.

Florence V. Lucas
Deputy Commissioner

Appendix A

STATE OF NEW YORK: EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS

STATE DIVISION OF HUMAN RIGHTS

on the complaint of

PHYLLIS R. GOODKIN,

Complainant,

-against-

NEW YORK CITY BOARD OF EDUCATION; UNITED FEDERATION OF TEACHERS, AFL-CIO; ALBERT SHANKER, PRESIDENT AND CHAIRMAN, BOARD OF TRUSTEES; AND UNITED FEDERATION OF TEACHERS WELFARE FUND, RAYMOND LIZZA, ADMINISTRATOR,

Respondents.

NOTICE OF ORDER AFTER HEARING

CASE NO. CSF-32332-74

SIRS:

PLEASE TAKE NOTICE that the within is a true copy of an Order issued herein by Werner H. Kramarsky, Commissioner of the State Division of Human Rights, after a hearing held before Hearing Examiner Irwin H. Pantell, Esq. In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at 270 Broadway, New York, New York 10007. The Order may be inspected by any member of the public during the regular office hours of the Division.

Appendix A

PLEASE TAKE FURTHER NOTICE that in accordance with Section 297-a of the New York State Human Rights Law, any party to the proceeding aggrieved by said Order of the Division may obtain review thereof in a proceeding before the State Human Rights Appeal Board, 2 World Trade Center, 82nd Floor, New York, New York 10047, provided such appeal is commenced by the filing with the Board of a notice of appeal within fifteen (15) days after the service of this Order.

DATED: JUN 20 1975

NEW YORK, NEW YORK.

STATE DIVISION OF HUMAN RIGHTS

s/ Werner H. Kramarsky
WERNER H. KRAMAPSKY
COMMISSIONER

TO:

Ms. Phyllis R. Goodkin
37 Coleridge Street
Brooklyn, New York 11235

New York City Board of Education
65 Court Street
Brooklyn, New York 11201
Attention Mr. Frank Arricale, Director of Personnel

United Federation of Teachers, AFL-CIO
260 Park Avenue
New York, New York 10010

Mr. Albert Shanker, President and Chairman
Board of Trustees
United Federation of Teachers, AFL-CIO
260 Park Avenue
New York, New York 10010

Appendix A

United Federation of Teachers Welfare Fund
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270 Broadway
New York, New York 10007

Hon. Louis J. Lefkowitz
Attorney General
2 World Trade Center
New York, New York 10047

Appendix A

STATE OF NEW YORK: EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS

STATE DIVISION OF HUMAN RIGHTS

on the complaint of

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Respondents.

CASE NO. CSF-32332-74

PROCEEDINGS IN THE CASE

On the 15th day of January, 1974, the above-named Complainant filed a verified complaint, thereafter amended, with the State Division of Human Rights (hereinafter the "Division") charging the above-named Respondents with an unlawful discriminatory practice relating to employment, in

violation of the Human Rights Law (Executive Law, Article 15) of the State of New York.

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondents had engaged in an unlawful discriminatory practice. The Division thereupon referred the case to public hearing.

After due notice, the hearing was held on September 16, 1974 and October 16, 1974 before Irwin H. Pantell, Esq., a Hearing Examiner of the Division.

At the hearing Complainant appeared. Respondent New York City Board of Education was represented by Adrian P. Burke, Esq., Corporation Counsel, by Barry Berger, Esq., of Counsel. Respondents United Federation of Teachers Welfare Fund and Raymond Lizza appeared and were represented by Delson & Gordon, Esqs., by Richard Brook, Esq., of Counsel, which firm also represented the Respondents United Federation of Teachers, AFL-CIO and Albert Shanker. Thereafter the firm of Mirkin, Barre, Saltzstein & Gordon, P.C., were substituted in the place of Delson & Gordon, Esqs. The Division was represented by Henry Spitz, Esq., General Counsel, by Howard Hertzberg, Esq., of Counsel.

FINDINGS OF FACT

1. Complainant Phyllis R. Goodkin is a female who has been a regularly appointed teacher employed by the Respondent New York City Board of Education (hereinafter "City Board") since 1961.

2. In or about September, 1971, the Complainant requested and was granted maternity leave by the Respondent City Board for the period commencing on or about September 14, 1971, to on or about September 9, 1976.

3. The Respondent United Federation of Teachers, AFL-CIO (hereinafter "UFT") is a labor organization representing teachers, including Complainant, employed by Respondent City Board. Respondent Albert Shanker, at all times herein pertinent, was the president of the Respondent UFT as well as Chairman of the Board of Trustees of Respondent United Federation of Teachers Welfare Fund (hereinafter "Fund").

4. The Respondent Fund was established as a result of collective bargaining between Respondent UFT and Respondent City Board, to provide certain medical, dental and allied health benefits to covered employees and as such is a labor organization within the meaning and intent of the Human Rights Law.

5. The Respondent Fund is completely financed by the Respondent City Board pursuant to the collective bargaining agreement between Respondents UFT and City Board.

6. Respondent Fund is administered by a Board of Trustees which in turn employs a director and staff responsible for the daily operations of the Fund including determination of eligibility and processing of claims. The Board of Trustees consists of five persons designated by the Respondent UFT.

7. Respondent, Raymond Lizza, who at all the times herein pertinent was the director of the Fund, testified that the Administrative Committee of the UFT appoints the Trustees of the Fund and that the Trustees hire employees upon the recommendation of the Administrative Committee; and that at all the times herein pertinent, the Trustees of the Fund were officers of the UFT.

8. Respondent Fund has defined covered employees as "Employees of the New York City Board of Education who are compensated on an annual basis and who are covered by

agreements with the United Federation of Teachers and for whom the Board contributes or should contribute monies to the UFT Welfare Fund. . ." and includes day school teachers such as Complainant.

9. Covered employees are eligible for benefits as long as they are on active status. An employee must be on the payroll as an active employee to be eligible for benefits. An employee on paid sick leave or authorized sick leave without pay is considered to be on active status under the eligibility rules.

10. The Respondent Fund is bound by the terms of the collective bargaining agreement between the Respondents UFT and City Board, and cannot define eligibility differently than that defined by the collective bargaining agreement.

11. The Respondent Board provides for a supplementary obstetrical allowance of $50 for normal deliveries.

12. Complainant gave birth on October 11, 1971 and directly thereafter duly applied for the aforesaid supplementary obstetrical allowance.

13. Respondent Fund denied the claim because Complainant was deemed to be on inactive status at the time she gave birth, and hence ineligible for the benefit. As a result thereof, Complainant filed the instant complaint on January 15, 1974, after repeated attempts to secure the aforesaid benefit. The Respondents specifically waived any defense based on the Statute of Limitations.

14. Maternity leave is the only type of leave connected in any way with a temporary physical disability which does not carry fringe benefits for any portion of the leave.

15. All types of sick leave, paid or unpaid, including unpaid leave for restoration of health, carry fringe benefits for the entire period of leave.

16. Any policy or practice which treats maternity leave less favorably than leave for other disabilities discriminates against female employees because of sex, and violates the Human Rights Law.

17. A pregnancy related disability must be treated the same as any other physical disability in determining whether a person is entitled to receive any fringe benefits.

18. There is no evidence that Respondent Albert Shanker or Raymond Lizza, individually and independently committed any unlawful discriminatory act against Complainant or that either of them acted in other than a representative capacity in the instant matter.

19. I find that the policy of the Respondents, City Board, UFT and Fund, discriminated against the Complainant in the terms, conditions and privileges of employment because of her sex, in violation of the Human Rights Law.

DECISION

On the basis of the foregoing, I find that the Respondents, New York City Board of Education, United Federation of Teachers, AFL-CIO, and United Federation of Teachers Welfare Fund, discriminated against Complainant because of her sex in the terms, conditions and privileges of her employment, in violation of the Human Rights Law.

On the basis of the foregoing, I further find that Respondents Albert Shanker and Raymond Lizza did not commit any unlawful discriminatory act against Complainant.

Appendix A

On the basis of the foregoing, I further find that the awarding of compensatory damages to the aggrieved Complainant will effectuate the purpose of the Human Rights Law.

ORDER

Upon the basis of the foregoing Findings of Fact and pursuant to the Human Rights Law, it is hereby

ORDERED, that the complaint against the Respondents Albert Shanker and Raymond Lizza be and the same is hereby dismissed, and it is further

ORDERED, that the Respondents New York City Board of Education, United Federation of Teachers, AFL-CIO and United Federation of Teachers Welfare Fund, their agents, representatives, employees, successors and assigns shall cease and desist from discriminating against Complainant or any other employee or individual in the terms, conditions and privileges of employment because of the sex of such person, and it is further

ORDERED, that the Respondents New York City Board of Education, United Federation of Teachers, AFL-CIO and United Federation of Teachers Welfare Fund, their agents, representatives, servants, employees, successors and assigns shall take the following affirmative action which will effectuate the purposes of the Human Rights Law:

1. The said Respondents shall within thirty (30) days from the date of this Order becomes effective, pay to the Complainant as compensatory damages the sum of $50, plus interest at the rate of six percent per annum from November 1, 1971, in accordance with Section 5001 et seq., of the CPLR. Proof of payment shall be forwarded within ten (10) days thereof to the

Appendix A

State Division of Human Rights, 270 Broadway, New York 10007, Attention Legal Bureau.

2. The said Respondents shall send a memorandum to all supervisory employees, agents, representatives and officers, advising that each Respondent has a policy of non-discrimination because of sex and all supervisory employees, agents, representatives and officers are required to implement such policy.

3. The said Respondents shall make available to the duly authorized representatives of this Division such information and documents as may be necessary for the Division to ascertain whether there is compliance with this Order.

DATED: JUN 20 1975

NEW YORK, NEW YORK

STATE DIVISION OF
HUMAN RIGHTS

s/ Werner H. Kramarsky
WERNER H. KRAMARSKY
Commissioner

APPENDIX B — DECISION AND ORDER OF THE NEW YORK STATE HUMAN RIGHTS APPEAL BOARD

STATE OF NEW YORK
Executive Department

STATE HUMAN RIGHTS APPEAL BOARD
Two World Trade Center — 82nd Floor
New York, N.Y. 10047
Tel: 488-2038 (area code 212)

NOTICE OF DECISION AND ORDER

To: All Parties to this Proceeding — APPEAL NO. 2885

PLEASE TAKE NOTICE that herewith attached is the Decision and Order of the State Human Rights Appeal Board.

ANY COMPLAINANT, RESPONDENT OR OTHER PERSON AGGRIEVED BY THIS ORDER MAY OBTAIN JUDICIAL REVIEW THEREOF. *Such proceeding shall be brought in the Appellate Division of the Supreme Court of the State in the appropriate judicial department WITHIN 30 DAYS OF SERVICE OF THIS ORDER.* (See Section 298, Human Rights Law.)

Attachment:

Appendix B

STATE OF NEW YORK: EXECUTIVE DEPARTMENT
STATE HUMAN RIGHTS APPEAL BOARD

STATE DIVISION OF HUMAN RIGHTS on the complaint of PHYLLIS GOODKIN,

Complainant-Respondent

vs.

NEW YORK CITY BOARD OF EDUCATION, RAYMOND LIZZA, ADMINISTRATOR,

Respondents

UNITED FEDERATION OF TEACHERS, AFL-CIO: ALBERT SHANKER, PRESIDENT AND CHAIRMAN; BOARD OF TRUSTEES & UNITED FEDERATION OF TEACHERS WELFARE FUND,

Respondents-Appellant

O R D E R

Case No. CSF-32332

APPEAL NO. 2885

The above-entitled appeal having been filed with this Board on June 30, 1975 and having come on to be heard before Hon. Emil Levin, then a Member of this Board, on the 14th day of January, 1976, and United Federation of Teachers, United Federation of Teachers Welfare Fund, Respondents-Appellant, having appeared by Mirken, Barre, Saltzstein & Gordon, Esqs., Robert M. Ziskin, Esq., of Counsel, who argued on their behalf, and Board of Education of the City of New York, Respondent-

Appendix B

Appellant, having appeared by W. Bernard Richland, Esq., Corporation Counsel, Barry Berger, Esq., of Counsel, who argued on its behalf, and Complainant-Respondent not having appeared and being deemed to have submitted on the record, and the State Division of Human Rights having appeared by Ann Thacher Anderson, Esq., Senior Attorney, of Counsel, who submitted on the record and the Presiding Member, Hon. Emil Levin having submitted his resignation to the Governor before the determination of the appeal, and

All parties herein having been duly notified of the resignation of the Presiding Member, Hon Emil Levin and the Respondents-Appellant having been given the opportunity to request a rehearing before another Presiding Member or to submit on the record, and Respondents-Appellant having requested oral argument, and Complainant-Respondent not having opposed the rescheduling of the appeal, and

The above-captioned appeal having been reassigned to Hon. Thomas A. Conniff and having come on to be reheard on the 8th day of December, 1976 and Respondents-Appellant having appeared by Mirken, Barre, Saltzstein & Gordon, Esqs., Robert M. Ziskin, Esq., of Counsel, who submitted a Supplemental Brief and argued on their behalf, and Complainant-Respondent not having appeared and being deemed to have submitted on the record, and the State Division of Human Rights having appeared by Ann Thacher Anderson, Esq., Senior Attorney, of Counsel, who submitted a Supplemental Brief and argued in support of the Order of the Commissioner of the State Division of Human Rights, and

The Board having reviewed the record herein and having considered the briefs and arguments of the parties, and a majority of the Board having decided that the Order appealed from herein is supported by substantial evidence on the whole record, it is

Appendix B

ORDERED, that the Decision and Order of the Commissioner of the State Division of Human Rights, made herein on the 20th day of June, 1975 be, and the same hereby in all respects affirmed.

Dated & Mailed: July 5, 1977

STATE HUMAN RIGHTS
APPEAL BOARD

s/ Irma Vidal Santaella
Irma Vidal Santaella
Chairman

TO:

Ms. Phyllis R. Goodkin
37 Coleridge Street
Brooklyn, New York 11235

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Mr. Albert Shanker, President and Chairman
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Appendix B

United Federation of Teachers Welfare Fund
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Appendix B

STATE OF NEW YORK: EXECUTIVE DEPARTMENT
STATE HUMAN RIGHTS APPEAL BOARD

STATE DIVISION OF HUMAN RIGHTS on the complaint of PHYLLIS GOODKIN,

Complainant-Respondent

vs.

NEW YORK CITY BOARD OF EDUCATION; RAYMOND LIZZA, ADMINISTRATOR,

Respondents

UNITED FEDERATION OF TEACHERS, AFL-CIO; ALBERT SHANKER, PRESIDENT AND CHAIRMAN; BOARD OF TRUSTEES & UNITED FEDERATION OF TEACHERS WELFARE FUND,

Respondents-Appellant

D E C I S I O N

Case No. CSF-32332-74

APPEAL NO. 2885

On the basis of the decision of the New York Court of Appeals in Brooklyn Union Gas Company v. State Human Rights Appeal Board 41 NY 2d 84, we affirm the Decision and Order of the Commissioner of the State Division of Human Rights, dated June 20, 1975.

With regard to Appellant's argument that the supersedure clause of ERISA, 29 USC § 1144 (a) precludes application of the provisions in the Human Rights Law prohibiting

Appendix B

discrimination by employers or labor organizations in terms, conditions or privileges of employment embodied in employee benefit plans, we believe that the language of the supersedure clause permits application of State fair employment legislation to plans ruled to be inside the exclusions written into the act.

Dated & Mailed: July 5, 1977

s/ Thomas A. Conniff
Thomas A. Conniff

The following Members concur in the foregoing Decision and Opinion:

Hon. Irma Vidal Santaella
Hon. Tibby Blum
Hon. Richard Wong

APPENDIX C — ORDERS OF THE APPELLATE DIVISION FIRST JUDICIAL DEPARTMENT

At a term of the Appellate Divison of the Supreme Court held in and for the First Judicial Department in the County of New York, on October 13, 1977.

Present — Hon. Theodore R. Kupferman, Justice Presiding,
Harold Birns,
Louis J. Capozzoli,
Myles J. Lane, Justices.

In the Matter of United Federation of Teachers Welfare Fund and United Federation of Teachers, AFL-CIO,

Petitioners,

-against-

State Human Rights Appeal Board and State Division of Human Rights on the Complaint of Phyllis Goodkin,

Respondents.

958
[M-3150]

The above-named petitioners having presented a petition to this Court praying for an order, pursuant to Section 298 of the Executive Law and pursuant to Article 78 of the Civil Practice Law and Rules, setting aside the determination of the State Human Rights Appeal Board dated July 5, 1977, which affirmed an order of the New York State Division of Human Rights dated June 20, 1975.

And respondent State Division of Human Rights having interposed an answer to said petition.

Appendix C

Now, upon reading and filing the notice of application, with proof of due service thereof, the petition, verified July 27, 1977, and the exhibits annexed thereto, and the memoranda of Mirkin, Barre, Saltzstein & Gordon, P.C. in support of the application; and the answer of respondent State Division of Human Rights, verified August 19, 1977, and the memorandum of Ann Thacher Anderson in opposition to said application; and after hearing Mirkin, Barre, Saltzstein & Gordon, P.C., for the application, and Ann Thacher Anderson opposed; and due deliberation having been had thereon,

It is unanimously ordered that the determination of The State Human Rights Appeal Board be and the same hereby is confirmed, without costs and without disbursements, and the petition dismissed.

ENTER:

JOSEPH J. LUCCHI
Clerk

Appendix C

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 20, 1977

Present — Hon. Theodore R. Kupferman, Justice Presiding,
Harold Birns
Louis J. Capazzoli
Myles J. Lane, Justices.

In the Matter of United Federation of Teachers Welfare Fund and United Federation of Teachers, AFL-CIO,

Petitioners,

-against-

State Human Rights Appeal Board and State Division of Human Rights on the Complaint of Phyllis Goodkin,

Respondents.

M-3887

The above named petitioners having moved for leave to reargue their petition to review the determination of the State Human Rights Appeal Board dated July 5, 1977 which determination was unanimously confirmed and the petition dismissed by order of this Court entered on October 13, 1977, or, in the alternative, for leave to appeal to the Court of Appeals.

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the statement of Robert M. Ziskin in support of said motion, and the statement of Ann

Appendix C

Thacher Anderson in opposition thereto, and after hearing Mr. Robert M. Ziskin for the motion, and Ann Thacher Anderson opposed,

It is ordered that said motion be and the same is hereby denied in all respects with $20 costs.

ENTER:

JOSEPH J. LUCCHI
Clerk

APPENDIX D — ORDER OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-third day of March A.D. 1978

PRESENT, Hon. Charles D. Breitel, Chief Judge, presiding.

United Federation of Teachers Welfare Fund and United Federation of Teachers, AFL-CIO,

Appellants,

vs.

State Human Rights Appeal Board and State Division of Human Rights on the Complaint of Phyllis R. Goodkin,

Respondent.

Mo. No. 92

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

s/ Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court

APPENDIX E — NEW YORK HUMAN RIGHTS LAW SECTION 296, 1(a), (b), (c)

"§296. Unlawful discriminatory practices

1. It shall be an unlawful discriminatory practice:

(a) For an employer, because of the age, race, creed, color, national origin or sex of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

(b) For an employment agency to discriminate against any individual because of his age, race, creed, color, national origin or sex, in receiving, classifying, disposing or otherwise acting upon applications for its services or in referring an applicant or applicants to an employer or employers.

(c) For a labor organization, because of the age, race, creed, color or national origin or sex of any individual, to exclude or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer. . . ."

APPENDIX F — NEW YORK HUMAN RIGHTS LAW SECTION 298

"§298. Judicial review and enforcement

Any complainant, respondent or other person aggrieved by any order of the board may obtain judicial review thereof, and the division may obtain an order of court for its enforcement and for the enforcement of any order of the commissioner which has not been appealed to the board, in a proceeding as provided in this section. Such proceeding shall be brought in the appellate division of the supreme court of the state in the judicial department embracing the county wherein the unlawful discriminatory practice which is the subject of the order occurs or wherein any person required in the order to cease and desist from an unlawful discriminatory practice or to take other affirmative action resides or transacts business. Such proceeding shall be initiated by the filing of a petition in such court, together with a written transcript of the record of all prior proceedings and the issuance and service of a notice of motion returnable before such appellate division of the supreme court. Thereupon the court shall have jurisdiction of the proceeding and of the questions determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript an order enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part such

order. No objection that has not been urged in prior proceedings shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. Any party may move the court to remit the case to the division in the interests of justice for the purpose of adducing additional specified and material evidence and seeking findings thereon, provided he shows reasonable grounds for the failure to adduce such evidence in prior proceedings. The findings of facts on which such order is based shall be conclusive if supported by sufficient evidence on the record considered as a whole. All such proceedings shall be heard and determined by the court and by the court of appeals as expeditiously as possible and with lawful precedence over other matters. The jurisdiction of the appellate division of the supreme court shall be exclusive and its judgment and order shall be final, subject to review by the court of appeals in the same manner and form and with the same effect as provided for appeals from a judgment in a special proceeding. The division's copy of the testimony shall be available at all reasonable times to all parties for examination without cost and for the purposes of judicial review of such order. The appeal shall be heard on the record without requirement of printing. The division may appear in court by one of its attorneys. A proceeding under this section when instituted by any complainant, respondent or other person aggrieved must be instituted within thirty days after the service of such order."

77-1799

Supreme Court, U.S.
FILED
JUL 20 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-

UNITED FEDERATION OF TEACHERS
WELFARE FUND,

Petitioner,

vs.

STATE HUMAN RIGHTS APPEAL BOARD and
STATE DIVISION OF HUMAN RIGHTS on the
Complaint of PHYLLIS R. GOODKIN,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR RESPONDENT STATE DIVISION OF HUMAN RIGHTS IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-

UNITED FEDERATION OF TEACHERS WELFARE FUND,

Petitioner,

vs.

STATE HUMAN RIGHTS APPEAL BOARD and STATE DIVISION OF HUMAN RIGHTS on the Complaint of PHYLLIS R. GOODKIN,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR RESPONDENT STATE DIVISION OF HUMAN RIGHTS IN OPPOSITION

Question Presented

In view of the inapplicability of the Employee Retirement Income Security Act of 1974 to matters antedating January 1, 1975, and in view of provisions in the Civil Rights Act of 1964 which preserve State fair employment legislation providing more comprehensive protection to

employees than what is afforded by Title VII, was the New York Court of Appeals correct in letting stand a decision of the Appellate Division* requiring provision to a female employee who gave birth in 1971 of a $50.00 obstetrical benefit provided by petitioner to male employees whose wives give birth?

Statement of the Case

Petitioner would have this Court review application of New York's fair employment legislation, N.Y. Executive Law Art. 15 (McKinney's 1972), hereinafter "the Human Rights Law", to a New York-based employer and contracting labor organizations which disallowed to a female employee who gave birth in 1971 a $50.00 obstetrical benefit routinely provided male employees whose wives give birth. Although the facts of the case date back to 1971, petitioner perceives a conflict with the Employee Retirement Income Security Act of 1974, 88 Stat. 832, 29 U.S.C. §§1001 *et seq.* (ERISA). Although the Civil Rights Act of 1964, 78 Stat. 241, 42 U.S.C. §§2000a *et seq.*, recognizes and preserves State fair employment legislation providing more comprehensive protection to employees, petitioner perceives a conflict with Title VII, 42 U.S.C. §§2000e-1 *et seq.*, and with decisions of this Court, sufficient to raise a question under the Supremacy Clause, U.S. Const. Art. VI cl. 2.

The Division respectfully submits, for the reasons set forth below, that petitioner does not raise a substantial Federal question warranting certiorari.

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* *United Federation of Teachers Welfare Fund* v. *State Human Rights Appeal Board*, 59 App. Div. 2d 826, —— N.Y.S.2d —— (1st Dept. 1977), *appeal denied*, 44 N.Y.2d 641, —— N.E.2d —— (1978).

Reasons Certiorari Should Be Denied

I. Petitioner raises no substantial question under ERISA.

Petitioner relies on footnote #1 in *Malone* v. *White Motor Corp.*, —— U.S. ——, 55 L. Ed.2d 443, 447 (1978) to substantiate its argument that the New York Court of Appeals erred in refusing to grant its motion to appeal. That footnote, after stating that ERISA is a comprehensive Federal regulation pre-empting state laws, goes on to say that "ERISA did not become effective until January 1, 1975, and expressly disclaims any effect with regard to events before that date. . . ." This language recapitulates 29 U.S.C. §1144(b), providing that ERISA does not apply to causes of action which arose before January 1975.

The cause of action in this case accrued in 1971, when the complainant was disallowed the $50.00 obstetrical benefit provided by petitioner and the Board of Education of the City of New York to male employees whose wives give birth. ERISA has no pre-emptive effect.

But even if ERISA did apply, it would not necessarily pre-empt application of the Human Rights Law in this case. ERISA contains a nonimpairment clause indicating Congressional intent to permit application of State fair employment legislation:

> "Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or

regulation issued under any such law." 29 U.S.C. §1144(d).

Title VII is not mentioned in 29 U.S.C. §§1031, 1137(b), and therefore continues in full force and effect.

No distinction is made in ERISA between the substantive provisions of Title VII, 42 U.S.C. §§2000e-2, 2000e-3, and the numerous provisions recognizing and preserving State and local fair employment legislation and deferring to the jurisdiction and remedial power of agencies enforcing such legislation, 42 U.S.C. §§2000e-4(f)(1), 2000e-5(b)-(e), 2000e-7, 2000e-8(b); §2000h-4. The non-impairment clause of ERISA preserves Title VII in its entirety, including provisions permitting enactment and application of more stringent State statutes.

During debate on ERISA, an amendment was offered to add a clause prohibiting discrimination. The amendment was dropped after reference was made to the applicability of the prohibitions in Title VII. 119 *Cong. Rec.* 30409-10 (Sept. 19, 1973); 120 *Cong. Rec.* 4726 (Feb. 28, 1974).

Rejection by Congress of a nondiscrimination clause in ERISA, and Congressional reliance, in the drafting and enactment of ERISA, upon Title VII and its provisions acknowledging and preserving State fair employment legislation appear to place a heavy burden upon those who would argue that States should have no role in eliminating discrimination in employee benefit plans. See Feerick, "Labor Relations—Birth of a Child," N.Y.L.J. June 3, 1977 p. 1 col. 1 at 26 col. 3. The Division respectfully submits that this is not a case in which that burden can be discharged.

II. Petitioner raises no substantial question under Title VII.

Petitioner cites *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), and *Social Service Employees Union, Local 371* v. *Women in City Government United*, 429 U.S. 1033 (1977) to justify its withholding from female employees the obstetrical benefit provided for male employees whose wives give birth. Those cases are not in point.

Aiello upholds under the Equal Protection Clause of the Fourteenth Amendment a California statute excluding disabilities connected with normal pregnancy from coverage of an employee-funded program of disability benefits. In a footnote which is frequently cited and quoted, this Court took care to point out that State legislatures are constitutionally free to include or exclude pregnancy from the coverage of such legislation on any reasonable basis, just as with respect to any other physical condition. 417 U.S. at 496 n. 20. Under *Aiello*, therefore, State fair employment legislation may constitutionally be applied to protect pregnant workers from disallowance of employee benefits paid to men.

Gilbert holds that an employer does not discriminate as to sex in violation of Title VII by excluding pregnancy-related disabilities from fringe benefits provided for other disabilities. The issue here is different. Petitioner provides an obstetrical benefit but only to employees "in active status." Since most female employees are on leave and in inactive status at the time they give birth, and most male employees are in active status at the time their wives

give birth, most female employees are prevented by petitioner from receiving a benefit available to most appropriately circumstanced male employees. Even if this Court were to equate the issue here with the issue in *Gilbert*, however, it could not hold that Title VII controls and restricts interpretation of the Human Rights Law. Title VII not only recognizes and preserves State fair employment legislation, but permits such legislation to provide more protection, and more stringent sanctions, than Title VII itself. When the state statute permits what Title VII prohibits there is conflict and Title VII will pre-empt and supersede. 42 U.S.C. §2000h-4. But when the state statute prohibits what Title VII permits there is no preemption. 42 U.S.C. §2000e-7. States remain free, after as before enactment of Title VII, "to extend the area of non-discrimination beyond that which the Constitution itself exacts", Frankfurter, J., concurring, in *Railway Mail Association* v. *Corsi*, 326 U.S. 88, 98 (1945).

The *Women in City Government* case, to which petitioner was a party, does not indicate that certiorari should be granted in this case. The issue in that case resembles the issue in *Gilbert*, not the issue here. Even if this Court should perceive a Federal question in the determination of the New York courts to apply the Human Rights Law more stringently than this Court saw fit to apply Title VII, this is not the appropriate case for review. To disallow to female employees a benefit available to appropriately circumstanced male employees is too plainly discriminatory to warrant consideration by this Court.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, N.Y.
July 19, 1978

Respectfully submitted,

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